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No. 08-460

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOE ISAACSON,
PHYLLIS LISA ISAACSON, ET AL.,

Petitioners,

v.

DOW CHEMICAL COMPANY,
MONSANTO COMPANY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

As argued in the Petition for a Writ of Certiorari, the Second Circuit's decision below conflicts with decisions of numerous lower federal courts and of this Court by holding that the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), permits removal by a private government contractor being sued for actions that the government neither addressed in its contract nor directed thereafter. Respondents try to obscure this split of authority by making erroneous assertions about the decision below, including that it held that the federal government directed, controlled and supervised the manufacture of Agent Orange or, more specifically, the 2,4,5-T in which the dioxin contaminant was produced. However, one is hard-pressed to find the facts Respondents allege even mentioned by the Second Circuit, save where the court squarely *rejected* their allegations. As a result, Respondents rarely cite to the Second Circuit's opinion itself, which significantly broadens the scope of § 1442(a)(1) by holding that the statute permits removal whenever a private defendant merely *alleges* that the act forming the basis of suit (here, production of dioxin in Agent Orange) occurred *while* the defendant was performing under a federal government contract. *See* Pet. 17a.

This expansive ruling cannot be reconciled either with other lower court decisions requiring government direction of the specific conduct forming the basis of suit for a private contractor to obtain federal officer removal, or with this Court's decisions applying § 1442(a)(1) or other statutes covering acts done

"under color" of government authority. In light of this significant split of authority over the jurisdictional question presented, the Petition for a Writ of Certiorari should be granted.

I. Respondents Try to Recast the Supporting Facts and Substance of the Second Circuit's Opinion to Obscure the Split of Authority Implicated by This Decision.

Federal courts in other Circuits have consistently held that § 1442(a)(1)'s "act under color" or causation prong, *see Willingham v. Morgan*, 395 U.S. 402, 409 (1969), requires defendants to show that the government directed the specific conduct that is the basis of suit. *See, e.g., Green v. A.W. Chesterton Co.*, 366 F. Supp. 2d 149, 155 (D. Me. 2005); *Freiberg v. Swinerton & Walberg Prop. Serv's, Inc.*, 245 F. Supp. 2d 1144, 1155 (D. Colo. 2002); *Arness v. Boeing North Am., Inc.*, 997 F. Supp. 1268, 1275-76 (C.D. Cal. 1998); *Good v. Armstrong World Ind's, Inc.*, 914 F. Supp. 1125, 1130 (E.D. Pa. 1996).

Recognizing this, Respondents try to reframe the decision below as one involving "compelled" production of a product by repeatedly citing to the "rated" order system that had long been in place for most military contracts under the Defense Production Act of 1950 ("DPA"), 64 Stat. 798 (codified at 50 U.S.C. App. §§ 2061 *et seq.*). *See* Opp. 2, 3-4, 18, 20. However, the Second Circuit never even mentioned, let alone

relied upon, the DPA in upholding removal. This is most likely because Petitioners presented two extensive affidavits from Professor Ralph Nash, one of the country's foremost experts on government contract law, demonstrating both that there was nothing unique about the contracts Respondents voluntarily bid for and that Respondents were never "compelled" to do anything. *See* AA6991-94, 10348-52.[1] Thus, rather than finding that Respondents' production of Agent Orange was compelled, the Second Circuit expressly held as a matter of law that § 1442(a)(1) does not require a private contractor to show such compulsion. *See* Pet. 18a ("To require the relationship to have been . . . coerced makes little sense.").[2]

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[1] "AA" refers to Plaintiffs-Appellants' appendix in the Second Circuit.

[2] Respondents erroneously maintain that 2,4,5-T was not a commercial product. Opp. 11. But at the time of its use in Vietnam, every year 50 million tons of 2,4,5-T were being sprayed commercially in the United States. AA4248, 4276, 4774. As the official Air Force History of Operation Ranch Hand stated: "None of the herbicides . . . were of a new or experimental nature. AA7986; *see also* AA4476, 4493, 5804-46, 5958, 6340-51, 6817. 2,4,5-T and 2,4-D had been sold separately or together for almost two decades. AA5507-17, 5521-42, 5693, 5801, 5846, 6817. They killed different plants, so they were frequently used in combination to defoliate places such as railroad right-of-ways. Respondents' employees testified that the specifications for 2,4,5-T were the same whether the use was commercial or military. AA6198, 6280-84, 8145. Dow even held a patent on Agent Purple. AA3850-55, 5908-09. Although Respondents contend that Agent Purple/Orange was 100% herbicide, the chemical at issue, 2,4,5-T, constitutes only 50% of these "Agents." Since 2,4,5-T was invariably sold commercially in stand-alone concentrations of 55% or

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Alternatively, Respondents by sleight of hand try to insert the heretofore necessary "control" element into the Second Circuit's decision by substituting in the *district court's* finding that "'the government designed, controlled, and supervised the production'" of Agent Orange. *See, e.g.*, Opp. 3, 9, 13 (citing Pet. 36a); Opp. 15 (citing Pet. 37a, 39a). But the Second Circuit, in its companion opinion on summary judgment, squarely *rejected* this very finding:

> The defendants do not contest that the government's contractual specifications for Agent Orange were **silent regarding the method of manufacture** or that the government harbored **no preference**, expressed or otherwise, regarding **how the herbicides were to be produced**. *See, e.g.*, Appellees' Br. at 36-37. Indeed, they admit that they were under **no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the resulting toxicity levels**.

In re "Agent Orange" Prod. Liability Litig., 517 F.3d 76, 93 (2d Cir. 2008) (copied in Pet. No. 08-461 at 31a) (emphasis added).

Having thus squarely rejected Respondents' contention that the government designed, controlled,

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more, commercial 2,4,5-T had a greater concentration of 2,4,5-T, and hence dioxin, than the 50% in the Agent Purple/Orange mixture. *See* Final Reply Brief of Plaintiffs-Appellants Daniel Raymond Stephenson, *et al.*, in No. 05-cv-1760 (2d Cir., filed June 23, 2006)).

and supervised the production of Agent Orange, the Second Circuit instead held that Respondents satisfied § 1442(a)(1)'s "act under color" or causation prong **merely by alleging** that the conduct at issue (i.e., the production of dioxin in the 2,4,5-T half of Agent Orange) occurred **during** performance of a federal government contract:

> Translated to non-governmental corporate defendants, such entities must demonstrate that the acts for which they are being sued – here, the production of dioxin in Agent Orange – occurred *because of* what they were asked to do by the Government. **We credit Defendants' theory** of the case when determining **whether a causal connection exists**. . . .
>
> . . . To show causation, **Defendants must only establish that the act** that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) **occurred *while* Defendants were performing their official duties**.

Pet. 17a (emphasis added). Thus, Respondents' protestations notwithstanding, the Second Circuit's removal decision was not based on any finding that the government either controlled or specifically directed Agent Orange production, much less that it participated in any way in producing the high levels of dioxin contamination that resulted from Respondents' selected proprietary production processes. Instead, the court broadly held that private contractors may remove cases to federal court simply by alleging that the conduct at issue occurred during

performance of a federal government contract. This conclusion conflicts with significant authority requiring government direction of the precise conduct that is the basis of suit.

II. The Decision Below Cannot Be Reconciled With This Court's Decisions Applying the Federal Officer Removal Statute and Other Similarly Worded Statutes.

Respondents also fail in trying to harmonize the Second Circuit's removal opinion with this Court's decisions applying § 1442(a)(1) and 42 U.S.C. § 1983's similarly worded coverage of persons acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory . . . " These decisions have consistently required parties invoking these statutes to show not simply that they were performing under government direction at the time of the acts at issue, **but that the government directed the specific acts** that form the basis of suit.

This Court has long recognized that § 1442(a)(1)'s requirements that a party be "acting under" a federal officer *and* that the suit be based on an "act under color of such office" are separate and distinct. In *Mesa v. California*, 489 U.S. 121 (1989), the Court held that U.S. Postal Service employees could not remove state criminal prosecutions for traffic offenses committed while on duty to federal court under § 1442(a)(1). In so holding, the Court recognized the parties' agreement that the postal workers were "'persons acting under' an 'officer of the United States or any agency

thereof' within the meaning of § 1442(a)(1)." *Id.* at 125. However, notwithstanding the state's concession that the defendants were acting under a federal officer, the Court proceeded to decide the separate question under § 1442(a)(1) of whether the state prosecutions were "'for act[s] under color of such office' within the meaning of that subsection," *id.*, *and held that they were not*. In light of the requisite separate treatment of the statute's "acting under" and "under color of office" prongs, the Second Circuit's decision below conflating them (*see* Pet. 15a-16a, 17a) and abdicating any analysis of whether **the specific conduct in question** was performed "under color of office," i.e., under the government's direction, supervision or control, is directly contrary to *Mesa*.

Respondents' attempts to harmonize *Mesa* with the decision below fail. Respondents correctly note (Opp. 16-17) *Mesa*'s holding that federal officer removal under § 1442(a)(1) must be predicated upon a federal law defense. 489 U.S. at 139. In so holding, however, the Court squarely rejected the U.S. government's argument that the statute's "under color of office" provision "must be construed broadly to permit removal of any civil actions or criminal prosecutions brought against a federal officer for acts done during the performance of his duties . . . " *Id.* at 135. Yet, despite *Mesa*'s rejection of this sweeping argument for removal by federal *employees*, the Second Circuit below embraced this very same argument as the basis for removal by *private contractor defendants*. *See* Pet. 17a.

Moreover, *Mesa* did not reject removal simply because of a pleading error by the defendants in

failing to assert a federal defense. Instead, the Court squarely found that "Mesa and Ebrahim have not *and could not* present an official immunity defense to the state criminal prosecutions brought against them." 489 U.S. at 133 (emphasis added). The reason these on-duty Postal worker defendants *could not* assert a federal law defense was that their specific conduct at issue, i.e., their commission of traffic offenses, was not itself directed by a federal officer, and thus could not be deemed an "act under color of such office." The decision below, by contrast, effectively jettisons this requirement by embracing the argument *Mesa* rejected and allowing private government contractors to obtain removal based on the mere fact that they contracted to produce a product for a federal officer – here, 2,4,5-T – regardless of the fact that the dioxin contamination was produced as a result of Respondents' proprietary, sub-standard production methods as to which the government never had any knowledge or input.

Respondents also fail to distinguish this Court's decisions repeatedly holding that 42 U.S.C. § 1983's substantively identical coverage of persons acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory" likewise requires government direction of the specific conduct that is the basis of suit. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) ("Thus, the private insurers in this case will not be held to constitutional standards unless there is a sufficiently close nexus between the State **and the challenged action** of the regulated entity so that the latter may be fairly treated as that of the State itself." (citation

omitted) (emphasis added); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) ("Acts of private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.").

Respondents contend, for example, that § 1983's coverage of acts under color of state *law* is far narrower than § 1442(a)(1)'s coverage of acts under color of federal *office*. *See* Opp. 18. But they cite no authority for attaching any significance whatsoever to this distinction between two statutes both aimed at conduct directed by government authority.

Nor do Respondents succeed in their attempt to harmonize these decisions on their facts. For example, Respondents try to distinguish this case from *American Manufacturers* on the grounds that here the government allegedly compelled production of Agent Orange under the DPA. Opp. 18. But, as discussed, the Second Circuit expressly eschewed any reliance on compulsion or control in reaching its holding. Pet. 18a. In doing so, the Second Circuit not only disregarded the § 1442(a)(1) and § 1983 cases discussed herein, but also directly contravened authority of this Court that turns on this precise distinction between general government oversight and specific government direction of the conduct that forms the basis of suit.[3]

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[3] In *Blum v. Yaretsky*, 457 U.S. 991 (1982), for example, the Court held that the Fourteenth Amendment's "state action" requirement, which is treated as co-extensive with § 1983's

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III. The Conflict Between the Decision Below and Those of Other Circuits Over Statutes Covering Acts "Under Color" of Government Authority is Marked and Apparent.

Significant circuit court case law addressing statutory requirements of acts "under color" of government authority relies on the difference between general government oversight and a lack of government command of the precise acts at issue. *See, e.g., Single Moms, Inc. v. Montana Power & Light*, 331 F.3d 743, 747 (9th Cir. 2003) ("The Supreme Court has held that an ostensibly private organization or individual's action may be treated as the government's action 'if, **though only if**, there is such a close nexus between the State **and the challenged action** that seemingly private behavior may be fairly treated as that of the State itself.'") (quoting *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2000)) (emphasis added); *Gallagher v. "Neil Young Freedom Concert,"* 49 F.3d 1442, 1452 (10th Cir. 1995) ("'Contemporary decisions stress the necessity of a close nexus between the state and the challenged conduct . . . '") (quoting *Wagner v. Metro. Nashville Airport Auth.*, 772 F.2d 227, 229 (6th Cir. 1985)).

"under color" provision (*see, e.g., Rendell-Baker, supra*, 457 U.S. at 838), did not cover a nursing home's discharge of Medicaid patients where the nursing home was required to complete patient assessment forms designed by the State, 457 U.S. at 1008, but was not required to use these forms in making discharge determinations. *Id.*

The decision below thus deepens a significant split of authority among circuit courts over the proper scope of federal statutes covering acts "under color" of government authority, as well as a significant lower court split over the scope of federal officer removal by private contractors under § 1442(a)(1) itself.

IV. This Court's Decision in *Watson* Militates in Favor of Rather Than Against Review.

Respondents' remaining major argument is that the Court should deny the Petition in order to allow lower courts to consider the effect of its decision addressing § 1442(a)(1) in *Watson v. Philip Morris Co's*, 551 U.S. 142, 127 S. Ct. 2301 (2007). *See* Opp. 1-2, 14-16, 19. This argument ignores the fact that *Watson* expressly declined to decide whether or how § 1442(a)(1) applies to government contractors. *See id.* at 2308 ("[W]e need not further examine here (*a case where private contracting is not at issue*) whether and when particular circumstances may enable private contractors to invoke the statute.") (emphasis added). Nor did *Watson* address the question raised here as to the removal statute's "act under color of [federal] office" requirement. *Watson* merely held that a private defendant's alleged compliance with federal regulation does not satisfy § 1442(a)(1)'s separate

and antecedent requirement that parties have been "acting under" a federal officer. 127 S. Ct. at 2307-08.[4]

Watson thus did not even purport to decide whether or when a private contractor is deemed "acting under" a federal officer, let alone to resolve the split of federal court authority over how § 1442(a)(1)'s additional requirement that suit be based on an "act under color of such office" may apply to any private party. For the reasons set forth herein and in the Petition, certiorari should be granted to bring consistency and clarity to this important area of jurisdictional law.

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[4] In so holding, the Court rejected Philip Morris's analogy of itself to government contractors, such as Agent Orange manufacturers, based upon the Fifth Circuit's holding (*albeit without any evidentiary record being submitted by the plaintiffs*) that these manufacturers were "acting under" a federal officer. *Id.* at 2308 (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998)). In rejecting this analogy, *Watson* described factors that *might* distinguish government contractors, but then, as stated, expressly excepted these issues from its consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

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